

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
SEPTEMBER 4, 2008 Session

**STEPHANIE CAPPS d/b/a STEPHANIE'S CABARET and SMITH  
INVESTMENT GROUP, L.P. v. METROPOLITAN GOVERNMENT OF  
NASHVILLE AND DAVIDSON COUNTY**

**Direct Appeal from the Chancery Court for Davidson County  
No. 04-3054-IV Richard H. Dinkins, Chancellor**

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**No. M2007-01064-COA-R3-CV - Filed December 31, 2008**

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This appeal arises out of the issuance and subsequent revocation of a permit authorizing the use of property for adult entertainment. The appellant filed a complaint seeking declaratory and injunctive relief regarding her right to operate the business. In addition, she claimed that her due process, equal protection, and First Amendment rights had been violated. The trial court dismissed the case, finding that the appellant's arguments regarding the requested declaratory and injunctive relief had been rejected in a related case, and declaring that the remaining constitutional claims were moot. We affirm in part, reverse in part, and remand for further proceedings.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,  
Reversed in Part and Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Bob Lynch, Jr., Nashville, TN, for Appellant Stephanie Capps d/b/a Stephanie's Cabaret

George A. Dean, Nashville, TN, for Appellant Smith Investment Group, L.P.

Sue B. Cain, Director of Law; J. Brooks Fox, Elizabeth A. Sanders, Assistant Metropolitan Attorneys, Nashville, TN, for Appellee

## OPINION

### I. FACTS & PROCEDURAL HISTORY

Smith Investment Group, L.P., (hereinafter, “SIG”) is the owner of property located at 660 Lafayette Street, in Nashville, Tennessee. In September of 2003, SIG leased the property to Stephanie Capps and her husband, David Capps (“the Capps”). The Capps intended to convert the existing building on the property into an adult entertainment establishment to be known as “Stephanie’s Cabaret.” On July 21, 2004, the Capps received building permit number 2004-06458A from the Department of Codes Administration for the Metropolitan Government of Nashville and Davidson County (“the Codes Department”), which authorized “interior rehab” of the building for “adult entertainment.”

On July 28, 2004, the Nashville Union Rescue Mission (“the Mission”) filed an appeal to the Metropolitan Board of Zoning Appeals (“the BZA”), challenging the decision of the Metropolitan Zoning Administrator, Lon F. West, to issue the permit to the Capps for adult entertainment.<sup>1</sup> Section 17.36.260 of the Metropolitan Code of Laws (“M.C.L.”) provided that “no adult entertainment establishment shall be within five hundred feet (measured property line to property line) of any church, school ground, college campus, or park.” The Mission is located directly across the street from the proposed location for Stephanie’s Cabaret, and the Mission contended that it is a “church” within the meaning of the distance requirement.

Following a hearing, the BZA voted to overturn the Zoning Administrator’s decision to issue the Capps a permit for adult entertainment. The BZA entered an order providing, in relevant part:

- (3) The Nashville Union Rescue Mission was found to be a church according to the provisions of Section 17.36.020.
- (4) The Nashville Union Rescue Mission was a church at the time a permit was issued to Stephanie’s as an adult business.

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<sup>1</sup> Tennessee Code Annotated section 13-7-206(b) provides, with regard to municipal zoning:

Appeals to the board of appeals may be taken by any person aggrieved . . . by any grant or refusal of a building permit or other act or decision of the building commissioner of the municipality or other administrative official based in whole or part upon the provisions of this ordinance enacted under this part and part 3 of this chapter.

Tennessee Code Annotated Section 13-7-207 further provides:

The board of appeals has the power to:

- (1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;

....

- (5) Therefore the Board found that the Zoning Administrator erred in the issuance of a permit to Stephanie's due to the spacing requirements in Section 17.36.020 for a church in relationship to an adult business.

M.C.L. section 16.04.120 provides that a permit or approval may be revoked "when it is determined that [the] permit has been issued in error." Mr. West, the Zoning Administrator, wrote a letter to SIG on October 1, 2004, which stated, in part:

As you are aware, the Metropolitan Board of Zoning Appeals through Appeal Case #2004-156 ruled that Permit 2004-06458A issued for this location as an "Adult Entertainment" business was issued in error. In light of this, any permits or other approvals you have in regard to occupying this property for this use are revoked. Should this activity be occurring on the property currently, it is to cease immediately. In the event the activity type of adult entertainment has not begun, this shall serve as notice that should this activity type occur on the property, it will be done illegally.

On November 12, 2004, SIG and Stephanie Capps d/b/a Stephanie's Cabaret filed a petition for writ of certiorari in the Chancery Court of Davidson County, seeking a review of the BZA's decision. They alleged that the BZA acted illegally, arbitrarily, and capriciously in revoking Ms. Capps' permit. In addition, the petitioners alleged that the BZA violated their procedural and substantive due process rights in violation of the United States and Tennessee Constitutions and 42 U.S.C. §§ 1983, 1988.

Previously, on October 26, 2004, SIG and Stephanie Capps d/b/a Stephanie's Cabaret had filed a separate, verified complaint in the Chancery Court of Davidson County, requesting declaratory and injunctive relief and alleging that Metro violated their procedural and substantive due process rights.<sup>2</sup> Specifically, the plaintiffs sought a declaration that they had acquired vested rights in their permit for adult entertainment, or that Metro was equitably estopped from revoking their permit. They also sought temporary and permanent injunctions permitting their operation of the adult entertainment establishment and prohibiting Metro from interfering with such use. The plaintiffs subsequently filed an amended complaint containing the following allegations:

37. Plaintiffs allege that the permitted use of Stephanie's Cabaret is for live dance and entertainment which is protected by the free speech clauses of the Tennessee and United States Constitutions. Thus, the actions and in actions [sic] of Metro have and is [sic] violating the Plaintiffs' [F]irst Amendment rights, which is doing them irreparable harm.

....

38. Plaintiffs allege that at the time Metro declared Plaintiffs' adult entertainment use of its property at 660 Lafayette Street illegal because it was within 500 feet of the Nashville Rescue Mission, at least one or possibly two similarly

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<sup>2</sup> This is the case currently before us on appeal.

situated adult entertainment establishments possessed the same use and occupancy certificates as Plaintiffs and were permitted [to] operate by Metro. This discrimination denied Plaintiffs equal protection of the law.

....

41. Plaintiffs' constitutional rights are violated because the metro distance ordinance favors a religious establishment in violation of the First Amendment.

Metro moved for summary judgment, and the plaintiffs moved for partial summary judgment.

In the first case, involving the petition for writ of certiorari, the chancellor ultimately ruled in favor of SIG and Ms. Capps, finding that the BZA acted illegally and arbitrarily in revoking their permit because, among other things, Ms. Capps had relied on the permit to her detriment. The chancery court entered an order requiring the BZA to re-issue the permit to Ms. Capps authorizing adult entertainment.

Following its ruling on the petition for writ of certiorari, the chancellor then entered an order in this case regarding the request for declaratory and injunctive relief and the constitutional claims. The court found that it had already addressed the plaintiffs' arguments concerning vested rights and equitable estoppel in the certiorari proceeding. In addition, the court concluded that "Plaintiffs' claims arising under the free speech clauses . . . and Plaintiffs' claims under the First Amendment . . . are moot in light of the Court's disposition of [the certiorari case]." Therefore, the chancery court dismissed the case.

Ms. Capps timely filed a notice of appeal to this Court.

## II. ISSUES PRESENTED

Ms. Capps presents the following issue for review:

Did the Chancellor commit error when he dismissed the Plaintiffs' Motion for Summary Judgment on Plaintiffs' civil rights claims resulting in the dismissal of the Verified Complaint?

For the following reasons, we affirm in part, reverse in part and remand for further proceedings.

## III. DISCUSSION

We begin by noting that the separate certiorari proceeding was also appealed to this Court, and in that case, we reinstated the decision of the BZA that Ms. Capps' adult entertainment permit was issued in error. *See Stephanie Capps d/b/a Stephanie's Cabaret, and Smith Investment Group, L.P. v. Metro. Gov't of Nashville & Davidson County, acting by and through the Metro. Bd. of Zoning Appeals*, No. M2007-01013-COA-R3-CV. In that opinion, we addressed the same issues

presented by Ms. Capps regarding vested rights, equitable estoppel, and due process, and concluded that her arguments were without merit. Thus, we affirm the chancery court's order to the extent that it dismissed Ms. Capps' requests for relief on these bases.

However, we have concluded that Ms. Capps' claims alleging First Amendment and Equal Protection violations should not have been dismissed as moot. "The mootness doctrine provides that before the jurisdiction of the courts may be invoked, 'a genuine and existing controversy, calling for present adjudication' of the rights of the parties must exist." *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007) (citing *State ex rel. Lewis v. State*, 208 Tenn. 534, 347 S.W.2d 47, 48 (1961)). A court may not issue an advisory ruling. *Id.*

A moot case is one that has lost its character as a present, live controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *Krug v. Krug*, 838 S.W.2d 197, 204 (Tenn. Ct. App. 1992); *LaRouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985). The central question in a mootness inquiry is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief. *Federal Practice and Procedure* § 3533.3, at 261. A case will generally be considered moot if it no longer serves as a means to provide relief to the prevailing party. *Church of Scientology v. United States*, 506 U.S. 9, ---, 113 S.Ct. 447, 449, 121 L.Ed.2d 313 (1992); *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Massengill v. Massengill*, 36 Tenn. App. 385, 388-89, 255 S.W.2d 1018, 1019 (1952).

*McIntyre v. Traugher*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994).

On appeal, Ms. Capps asks this Court to grant summary judgment in her favor on her First Amendment and Equal Protection claims and "remand the case for the Plaintiffs to seek attorney fees and costs as prevailing party pursuant to 42 U.S.C. § 1988."<sup>3</sup> We decline the invitation to grant summary judgment to Ms. Capps because of the lack of evidence in the record regarding these two issues. We also wish to emphasize that we express no opinion regarding the merits of Ms. Capps' claims. We simply find that they are not moot.

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<sup>3</sup> We note that Ms. Capps is not seeking damages for the alleged Constitutional violations.

#### **IV. CONCLUSION**

For the aforementioned reasons, we affirm the decision of the chancery court in part, reverse in part, and remand for further proceedings. Costs of this appeal are taxed to the appellant, Stephanie Capps d/b/a Stephanie's Cabaret, and her surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.